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In the
# Supreme Court of the United States
October Term, 1996

HANDICABS, INC.,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether an employer may properly protect its clients, all of whom have various disabilities, by prohibiting its employees from discussing personal or company problems with clients while they are being transported, as the clients are protected by both state and federal legislation?

2. Whether the National Labor Relations Board has jurisdiction to determine the rights of disabled persons pursuant to the Americans With Disabilities Act?

3. Whether Handicabs, Inc. permissibly terminated an employee for violating its rule against discussing company problems with clients?

## PARTIES TO THE PROCEEDINGS

Petitioner is Handicaps, Inc. Handicaps, Inc. is a Minnesota Corporation owned in its entirety by Joyce Doerffler.

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Handicabs, Inc. respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 95 F.3d 681 and is included in the Appendix at A-1 through A-9. The Order of the Court of Appeals denying rehearing is not reported and is included in the Appendix at A-10. The

Decision and Order of the N.L.R.B. which found that Petitioner violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, is reported at 318 NLRB 63 and is included in the Appendix at p. A-11 through A-46. The Decision of the Administrative Law Judge is not included separately, however, it is included within the Decision and Order of the NLRB.

## JURISDICTION

The decision of the Court of Appeals was entered on September 11, 1996. On November 26, 1996, the Court of Appeals denied Petitioner's Petition for Rehearing With Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES

29 USC § 157

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.....

29 USC § 158(a)

> It shall be an unfair labor practice for an employer--
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [29 USC § 157];
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization.....

42 USC § 12201(b)

Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.

42 USC § 12203(b).

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act.

Minn. Stat. § 626.557 (1994)

(b) "Vulnerable adult" means any person 18 years of age or older:

(1) who is a resident or inpatient of a facility;...

(4) who, regardless of residence or type of service received, is unable or unlikely to report abuse or neglect without assistance because of impairment

(d) Abuse means:....

(2) nontherapeutic conduct which produces or could be reasonably expected to produce pain or injury and is not accidental, or any repeated conduct which produces or could reasonably be expected to produce mental or emotional distress;

## STATEMENT OF THE CASE

Petitioner Handicabs, Inc. ("Handicabs") fashioned workplace rules for its employees that were designed to protect its clients, persons with disabilities. These rules were fashioned after the Minnesota Vulnerable Adults Act, Minn. Stat. § 626.557, which was first enacted in 1981. Petitioner believes that both its workplace rules and their enforcement were proper. Petitioner also believes it acted appropriately in firing Ron Trail, a driver for Petitioner at the time, for violating its company policies.

### 1. FACTUAL BACKGROUND

Handicabs, Inc. is a corporation whose sole business is the transportation of disabled and elderly persons within the seven county metro area of Minneapolis/St. Paul. Currently, Handicabs is one of two providers who together comprise this service, known as "Metro Mobility." This service is mandated by the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq.

On October 2, 1993, an event transpired that resulted in the near collapse of the entire Metro Mobility system. The actions of Ron Trail, must be viewed in the context of this event ATE Management Company (ATE), an out of state company, came to Minnesota in an attempt to centralize the scheduling and management of the Metro Mobility system. Claudia Fuglie, at the time an employee of ATE, testified that the system nearly collapsed. Clients often were not picked up and never got to their intended destination. Clients often had to wait hours for their rides. Ms. Snook, a Metro Mobility client, testified that when the system broke down, she drove her wheelchair to work in the dark.

The difficulties ATE had running the system were systemic and total, as nothing worked. Mr. Gary Nord testified that "the system suffered a breakdown...from everything from the routing to reservations to customer service to drivers and vans. It was a breakdown where passenger[s] were repeatedly stranded or refused rides or other ways inconvenienced with incredibly long trips."

Claudia Fuglie testified that it was not uncommon for a trip to last three to three and one half hours. She testified about being stranded by Metro Mobility even though she worked for ATE.

In December 1993, a class action lawsuit was filed by these 20,000 Metro Mobility clients against ATE for failing to provide transportation as mandated by the ADA. Handicabs was not named as a defendant in this lawsuit by the plaintiffs, the clients of Metro Mobility. The lawsuit was eventually settled, with ATE paying over one million dollars to pay for damages it caused by its failure to competently run the Metro Mobility system. More importantly, the settlement provided that ATE would step down as the administrator of the Metro Mobility system, allowing the system to improve. ATE ceased its Metro Mobility operations in Minnesota in April, 1994. Once Handicabs and the other providers were again responsible for their own scheduling and routes, their service was able to improve dramatically.

In May, 1994, Claudia Fuglie started working for Handicabs as a receptionist, shortly after ATE quit being the dispatcher for Metro Mobility. She uses Metro Mobility to get to work to Handicabs just as she did when she worked at ATE, as she suffers from spina bifida. Ms. Fuglie uses Metro Mobility as a paying customer. When Ms. Fuglie rides in a Metro Mobility van, her wheelchair is secured to the van by the driver. The purpose, obviously, is to prevent movement of the wheelchair and resulting injury to the occupant. Another result is that the passenger is confined and is completely at the

mercy of the driver. Ms. Snook also testified that when she is being driven in a van, she is strapped in and unable to move.

Around this time, a drive to unionize the drivers at Handicabs began. There was an active union supporter named Dennis Schusted. Mr. Schusted was asked to represent the Teamsters at the ballot. Mr. Schusted's activities in regard to the union were highly visible and well known before the election, commencing when the union drive started in June, 1994. Mr. Trail testified that he handed out union materials "outside the office." However, he admitted that no one connected to company management saw him do that or had any knowledge of such activity by Trail. No corroborating testimony was offered to the effect that Ron Trail helped organize the union. Ms. Doerffler testified that she had not heard about Trail attempting to organize other drivers until the day of the hearing.

Handicabs took care to educate Mr. Trail, and its other employees, about the Vulnerable Adults Act. He received separate trainings in regard to this Act in 1991 and again in the spring of 1994. In addition, the company employee handbook specifically ties the policy against discussing personal or company problems with clients to the Vulnerable Adults Act. Guided by the language of the VAA, the Addendum 2 of the handbook states, in relevant part, that:

> Discussing complaints or problems about the company with our clients will be grounds for immediate dismissal. . . .
> Retarded Clients must never be left unattended or left wandering outside their homes. If no one is home, call on the radio for further instructions on how to handle this problem.
> Vulnerable Adults Act (Minnesota Statute 626.557)
> All of our clients are protected by the Vulnerable Adults Act. According to this law, you must not

tease them, take monies (other than ride-fare or tip) from them, curse or use profanity while in their presence, or do anything verbal or physical of a sexual nature. Also, you must not put these people in a threatening or uncomfortable position by discussing any personal or company related problems that make them feel coerced or obligated to act upon. Charges can and have been brought up against drivers in the past for some of these types of situations. These acts are cause for immediate termination."

Commencing in late June or early July, Claudia Fuglie began to have Ron Trail as her driver from work to home. According to Fuglie, Mr. Trail repeatedly complained to her about Handicabs--approximately three to four times a week. Mr. Trail complained about being overworked. Ms. Fuglie would tell him to take his problems to management. However, he continued to complain about Handicabs. Ms. Fuglie attempted to change the subject, but Ron Trail would come back to his complaints about Handicabs. Ron Trail began talking about the union to Claudia Fuglie.

Ms. Fuglie testified that she experiences a degree of helplessness while being transported on Metro Mobility, as she is physically at the mercy of the drivers. She did not want to hear this talk from Ron Trail, but was scared that if she said anything too offensive he would retaliate against her. One message Ms. Fuglie clearly delivers, if one reads her testimony, is that she did not want to hear Ron Trail's complaints about the company and talk about the union. The second message is that these conversations Trail had with her were very upsetting, in that her mobility--and therefore her ability to function in life--were threatened. Common sense dictates that the act of repeatedly having conversations with a person who is essentially immobilized and who is not a willing

participant to those conversations is an act that constitutes abuse, whether or not the abuse is intentional. Whether or not her fears about reprisals from Trail had a basis in reality--Ms. Fuglie had such fears nonetheless. Ms. Fuglie testified that one form of reprisal she worried about was long rides. She was also concerned about her physical safety, since as a passenger, she was helpless. From the regular drives and manifests, Mr. Trail also knew much about her, including her address and schedule. Especially upsetting to Ms. Fuglie was Mr. Trail's discussions of a walk out--union or no union. This conversation was very threatening to Ms. Fuglie due to the severe difficulties suffered by Metro Mobility clients during ATE's management of the service, problems which had only begun to resolve with the withdrawal of ATE from the Metro Mobility service in April, 1994--just a few months earlier.

On September 20, 1994, Ms. Fuglie told Gary Nord that she had enough, and could he do something about it--but did not give him the names of any specific drivers. Gary Nord testified that Ms. Fuglie told him that a driver threatened a work stoppage--union or no union. Gary Nord told Joyce Doerffler about the situation as soon as Ms. Doerffler arrived. Ms. Doerffler went very soon after to Ms. Fuglie's desk to ask her about the situation, and the two retired to the women's bathroom to have a more private conversation. Ms. Fuglie told Joyce Doerffler that Mr. Trail was complaining about the company, and that the drivers were threatening to walk out--union or no union. Ms. Fuglie appeared to be very upset to Ms. Doerffler, and was also very visibly upset while testifying. See App. at A-28, 29. Trail admitted having discussions twice with Ms. Fuglie about company matters, in violation of the company handbook. He indicated that Ms. Fuglie initiated the first conversation which occurred in August. In another conversation that took place around September 13, 1994 (according to Trail), Trail testified that he complained that drivers were not being treated equally. Trail admits that he

discussed union matters with Ms. Fuglie on the second occasion.

The Minnesota Department of Jobs and Training agreed with Handicabs that Mr. Trail was properly dismissed for misconduct. The result of this decision was that Mr. Trail was no longer eligible to receive unemployment benefits.

## 2. PROCEEDINGS BELOW

### A. Proceedings before the NLRB

A Complaint and Notice of Hearing was served on Handicabs on or about October 27, 1994. The complaint alleged that Handicabs had violated Section 8(a)(1) of the Act by prohibiting employees from discussing company business with its clients. The Complaint further alleged that Handicabs violated 8(a)(3) of the Act by terminating Ron Trail for violating company policy. The hearing was held on February 6, 1995. On the day of the hearing, the complaint was also amended to include an alleged violation of 8(a)(1) based on a rule of Handicabs that prohibited employees from discussing wages among themselves. Handicabs admitted that was a labor violation and struck that rule from its handbook.

Handicabs asserted that there was no anti-union animus in its termination of Ron Trail as it was enforcing permissible restrictions on employee speech. Handicabs noted that there was not a single other instance of any action against employees who were involved in the union. In particular, no adverse action was taking against the employee who was most visibly attempting to recruit other drivers into the union.

The administrative law judge ("ALJ") issued his decision on May 5, 1995. He found that Handicabs impermissibly restricted employee speech and wrongfully terminated Ron Trail. While acknowledging that Petitioner had a duty to protect its clients, the ALJ declined to protect them from

employee speech in regard to company problems or union matters. Handicabs filed timely exceptions to the Board on May 31, 1995. The exceptions challenged the findings and conclusions of the ALJ, and also questioned whether the Board had jurisdiction to make determinations in regard to the ADA.

The Board affirmed the ALJ's decision on August 31, 1995. The Board had jurisdiction over the labor issues in this matter pursuant to 29 U.S.C. 151, 160 (a) ("the Act").

**B. Court of Appeals**

Petitioner timely filed a Petition for Review to the Court of Appeals on September 19, 1995. The matter was briefed, and oral argument heard on June 12, 1996. Petitioner contested the findings of fact and conclusions of law of the Board. Petitioner also raised the question of jurisdiction again.

The Court of Appeals issued its decision on September 11, 1996. The Court upheld the findings of the board, even though: "we might have reached a different decision had the matter been before us de novo." App. at A-5. The Court also upheld the Board's conclusions of law. In particular, the Court held that the Board's decision did not conflict with the Americans with Disabilities Act, or the Minnesota Vulnerable Adults Act.

Handicabs filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc on or about September 21, 1996. This petition was denied on November 26, 1996. App. at. A-10. The Court of Appeals had jurisdiction to review the Board's Decision and Order pursuant to 29 USC § 160 (e) and (f).

## REASONS FOR GRANTING PETITION

### 1. QUESTION 1

In *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979) and *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), it was held that health care facilities could ban employee solicitation as well as distribution of union materials in "immediate patient care areas" such as patient rooms and patient lounges. Handicabs believes that persons with disabilities should be afforded the same level of protection as hospital patients.

There are two main reasons for this belief. One is the added difficulty these persons have in their lives due to their disability. Some clients using Metro Mobility may have mental or emotional disorders. Drivers are instructed to insure that these clients get inside their designated destination and are not left outside. Persons with disabilities are more likely to be receiving medical attention for chronic problems than the average population. Often, clients use Handicabs' transportation to get to medical facilities. One apparent claim against ATE, a company that formerly ran Metro Mobility, was on behalf of the heirs of a passenger who died from not receiving a needed dialysis treatment, due to the extreme disruption of service.

The second reason persons with disabilities should be afforded protection from employee solicitation is the degree of absolute dependance they have on this transportation. Most people, if they are disturbed in some way by the conversation of a bus or taxi driver, are free to exit the vehicle and to arrange for alternate transportation. Persons with disabilities are not so free. In the case of Claudia Fuglie and Jan Snook, such passengers have their wheel chairs tied to the van to prevent injury to the occupant. The result is that many such persons are rendered immobile. Alternate Metro Mobility

transportation usually is not available, as most rides must be set up a few days in advance. These persons do not have alternatives.

Both the Board and the Eighth Circuit agreed that Petitioner has a responsibility to protect its clients. The Board noted that:

> "[S]ome words and conduct do cause greater concern for a vulnerable person than is the fact for other individuals. Still, any work rules must be narrowly tailored to avoid employees statutory rights." Decision and Order, App. at A-32, 33.

Despite this acknowledgment that vulnerable persons require additional protection, the Board's Order makes it very difficult for Handicabs to offer any such protection to its clients. The Order requires that Handicabs "rescind work rules which prohibit employees .... from discussing with passengers and clients job-related problems and complaints, and further, modify and republish company addendums no. 1 and no. 2 of employee handbooks to reflect those rescissions."App. at A-48. The Eighth Circuit's panel states that the Board's decision leaves open the opportunity for Handicabs to design a neutral rule that does not single out activity protected under the Act, but rather focuses on all speech and conduct that harms its passengers. App, at A-8. Handicabs' rule *was* neutral in that it attempted to prevent the upsetting of its clients by forbidding the discussion of personal as well as company problems. As the Board's Order outright prohibits Handicabs from forbidding discussions of company related problems, it is difficult to see how Handicabs can draft enforceable rules that prohibit discussions of subjects that clients may find distressing, even if the new rules were narrowly drafted to make it more clear that the prohibition on such discussions

were limited to those times that clients were actually being transported by Handicabs personnel.

By ordering these affirmative remedies, both the Board and the Eighth Circuit have held that persons with disabilities are not entitled to the same degree of protection from employee solicitation as are hospital patients. Handicabs believes both the Board and the Eighth Circuit erred in this regard.

Congress has recognized this fact and has protected the "enjoyment" of transportation mandated by the ADA, in addition to the transportation itself. 42 U.S.C. 12203(b). Minnesota has recognized the need for extra protection for these persons by passage of the Vulnerable Adults Act. The State of Minnesota has properly recognized the right of these persons to be protected from speech and actions that would not necessarily constitute abuse towards a healthy person without disabilities. Minn. Stat. § 626.557.

The District of Columbia Circuit recently looked at permissible restrictions on employee speech in a small ophthalmology center. This small medical center had a workplace rule that stated:

> All grievances are to be discussed in private with the office manager or physicians. It is totally unacceptable for an employee to discuss any grievances within earshot of patients.

*Aroostook County v. NLRB*, 81 F.3d 209, 211 (D.C. Cir. 1996). In *Aroostook*, as well as this matter, the Board faulted the medical center for failing to draft the rule more artfully to make it clear that the ban relates only to staff discussions that occur in immediate patient areas. *Id.*, at 213. The Circuit Court stated:

> Once again, the Board has imagined horrible hypothetical situations (which, if true, might violate the Act) that have nothing to do with the rule as written and enforced by the company. Even worse, in assessing ACROC's rules, the Board has failed to properly take account of the employment context in which this case arises.

*Id.* The Court further stated that in a "small medical practice, such as ACROC's, the employer has unique concerns about employees acting in a way that might disturb patients; in this situation, a rule prohibiting employees from voicing complaints in front of patients is neither surprizing nor unlawful. *Id.*

Handicabs' rule was designed to prohibit employees from discussing company problems while the clients are being transported. This is clear from the context of the rule, which also prohibits teasing, taking monies, and sexual conduct in the presence of the clients. Nothing in Handicabs' rule prohibits employees from discussing grievances with nonpassengers or from otherwise engaging in lawful protected activity.

The Board deflected Handicabs' valid desire to protect its clients by characterizing Ms. Fuglie's testimony in a very disparaging manner. The administrative law judge dismissed Ms. Fuglie's testimony as arising from mere anti-union animus. App. at A-29. The Board affirmed (but did not rely on) the following statement by the Administrative Law Judge:

> "It is not easy for someone in [Ms. Fuglie's] position to obtain employment. As a result, it should not be surprising that she would be disposed to take whatever measures she deemed necessary to assure that she retained her current job.

*Id.* Thus, Ms. Fuglie's attempt to exercise her statutory rights resulted in a federal agency characterizing her as someone desperate enough to say or do anything to keep her job. As discussed before the Board and the Eighth Circuit, it is this type of characterization that the ADA seeks to remedy. She was also described as the chief architect of the "plot" to get the union. The truth, however, is that Ms. Fuglie felt that she had been abused. The Board completely misses the point. Assuming for the purpose of argument, that the ALJ's characterization of Ms. Fuglie was accurate, and that her testimony was derived from a deep dislike of unions, it still does not follow that she should be subjected to such discussions against her will. The Board believes that employees have the right to speak their minds to a captive audience about business problems or union matters, no matter how much distress such a conversation may cause. .

Handicabs believes this case presents this Court with an important federal question. To the best of Petitioner's knowledge, this case is one of first impression, and requires a balancing of the statutory rights of the disabled and the rights of employees to engage in collective bargaining.

In addition, it appears that there is a conflict developing between the Circuit Courts in regard to permissible restrictions on employee speech. The District of Columbia Circuit found permissible strict rules forbidding the discussion of company business around clients in a small medical center, and upheld the termination of four nurses for violating that rule. *Aroostook*, 81 F.3d at 209. Petitioner believes that similar protections should be made available to its clients, particularly when they are afforded specific federal and state statutory protections..

## 2. QUESTION 2

The Board justified its refusal to consider the ADA and the Vulnerable Adults Act as follows: "In Section 10(a) of the Act, however, Congress provided that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." App. at A-35. While it is true that the Board does have jurisdiction over labor affairs pursuant to the Act, Congress has not given the Board authority to determine the rights of disabled persons under the federal ADA or the state Vulnerable Adults Act. Generally, an agency has primary jurisdiction to apply law to facts on a matter arguably within its statutory authority. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1343-44 (D.C. Cir. 1989). There is no question that the NLRB has primary jurisdiction over labor matters. Determination of issues regarding the rights of the disabled extends beyond such authority, however.

The Board has apparently determined the rights afforded the disabled pursuant to the ADA, an issue which is outside the Board's authority to regulate. The Notice to Employees which the NLRB has decided that Handicabs should publish, and for which the NLRB has now applied for enforcement, contains the following language:

> WE WILL not maintain nor enforce any work rule which prohibits you from ... discussing work-related complaints and problems with passengers and clients, and we will not maintain nor enforce any work rule which states that such discussions will be grounds for immediate discharge.
> WE WILL rescind work rules which prohibit you from .... discussing with passengers and clients job-related problems and complaints and we will modify

and republish company policy addendums .... no. 2 of our employee handbooks to reflect those rescissions."

App. at. A-47, 48. The Board expressly states that the Act has precedence over the ADA. The impact of the Board's Decision and Order is that the rights of employees, granted by Congress pursuant to the Act, have precedence over the rights of disabled persons, which also have been granted by Congress. In making this determination, the Board has exceeded its authority, as it does not have primary jurisdiction over the ADA. By enacting the ADA, Congress intended to provide specific rights to persons with disabilities. The Board has taken upon itself to undo this legislation.

The Board did not fully consider Petitioner's obligations pursuant to the VAA. In addition, the Board ruled that the Act had primary jurisdiction in this matter. However, the Board can not so easily dismiss the VAA as being secondary legislation which is preempted by the Act. The Supreme Court has stated:

> Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a doctrinaire localism but as a promoter of

> democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was merely a peripheral concern of the Labor Management Relations Act. . . .or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

*San Diego Unions v. Garmon*, 359 U.S. 236, 243-44 (1958). The *Garmon* Court had to decide whether state regulation of economic injuries caused by picketing was permissible. A state statute that protect disabled persons are at best a peripheral concern of the Board.

**3. QUESTION 3**

It is the burden of the General Counsel to prove that Trail's firing violated the Act. *NLRB v. Adams Delivery Serv. Inc.*, 623 F.2d 96 (1980). The essential elements of an unlawful discharge that violates Section 8(a)(3) are "a knowledge on the part of the employer that the employee is engaged in union activity and the actual discharge of the employee because of this activity." *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009 (3rd Cir. 1980). To establish that a discharge violates 8(a)(3), the General Counsel must prove that the employer knew of the employee's union activity and that the employee was discharged as a result of the union animus.

The resolution of this issue is determined by the level of protection afforded to the disabled. If the disabled are entitled to the same protection afforded hospital patients in *Beth Israel* and *Baptist Hospital*, then the findings and conclusions of the

Board are flawed, having been based on erroneous interpretation and application of law.

Prior to this event, the employer had no knowledge that Mr. Trail was involved with a union. Mr. Trail tended not stay around the company facilities either before or after his driving shifts. He was never seen handing out union materials around the company building or doing any other activity that indicated he was involved with the union until Ms. Fuglie's complaints about him were received. There is no supporting evidence that Mr. Trail's "union activities," if any, were carried on in such a manner, or at times, that in the normal course of events that Respondent would have noticed them. *Mantac Corporation and United Mineworkers of America*, 231 NLRB 858, 861 (1977); *Hadley Manufacturing Corporation and Amalgated Clothing Workers of America*, 108 NLRB 1641, 1650 (1954). In fact, Handicabs had no idea Trail was even going to claim he was a "union organizer" until the day of trial when he testified to that effect. App. at A-36. Trail agreed that Handicabs had no knowledge of his alleged union organizing.

If correct in its belief that its clients are deserving and entitled to protection from employee speech, Petitioner asserts that this matter does not fall under the *Wright Line* or *Great Dane* progeny of cases, where courts must look at whether the termination of an employee is motivated primarily by dual legitimate or illegitimate rationales, and the shifting burden of proof that results. *NLRB v. Great Dane Trailers, Inc.*, 387 U.S. 483 (1967); *NLRB v. Wright Line. A Div. of Wright Line* , 662 F.2d 899 (1rst Cir. 1981).

The only "union activity" of Ron Trail that Handicabs was aware of were his conversations with Ms. Fuglie and other clients. Handicabs specifically claims that such union activity is not protected by Section 7 and Section 8(a)(1) of the Act, according to rights and protections afforded clients by the ADA, the Vulnerable Adults, and restrictions approved

by the U.S. Supreme Court in *Baptist Hospital* and *Beth Israel Hospital*. Because Ron Trail participated in unlawful activities, Handicabs had a legitimate business reason for terminating his employment. Since the termination of Ron Trail was lawful, the General Counsel has not shown a prima facie case that the discharge of Ron Trail was unlawfully motivated.

Handicabs demonstrated no union animus in this case. Mr. Trail was fired because he discussed company business with clients, severely upsetting them in the process. Respondent has a long standing, reasonable and legitimate interest in protecting its clients and complying with federal and state legislation. Handicabs has immediately fired other drivers for violation of this policy and did not treat Mr. Trail any differently from other employees who had violated the Vulnerable Adults Act in the past. There was nothing discriminatory against the union in the application of Handicabs' policy, as the policy has been applied consistently. *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1338 (4th Cir. 1976). Handicabs took care to educate Ron Trail about this policy, the underlying state statute, and the reasons for it. There was nothing discriminatory about Respondent's policy, which has been applied consistently. Handicabs' policy is simple and legitimate--our clients have special needs and are the core of our business. Handicabs fires drivers who violate state and federal law by using speech or actions that upset its clients and have negative impacts upon their well-being.

The "resulting harm" to employee's rights from Respondent's actions is non-existent. Ron Trail could not get a single vote for the union by discussing company problems and union issues with clients of Metro Mobility. The only person who is employed by Handicabs and is also a client is Ms. Fuglie. But Ms. Fuglie was an office worker, and not a potential voter for the union.

The Board states that Trail was fired as a way to affect the upcoming election. App. at A-38-40. Handicabs had no intention of influencing the election. Handicabs did want to make sure that their employees stopped discussing the union to their clients for reasons clearly set out above. However, Petitioner's employees could not possibly affect the outcome of the election by discussing it with Handicabs' clients. Furthermore, Handicabs took absolutely no discriminatory action against the one person who was visibly the impetus for the union drive, Dennie Schusted.

For these reasons, the "resulting harm" to employee's rights from Respondent's actions is non-existent here. Even if it was concluded, in this matter, that the "resulting harm" to employees has risen to the level of comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful, and an affirmative showing of improper motivation must be made. *Great Dane*, 388 U.S. at 34 (1967). No such showing has been made.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 18, 1997

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UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3352

Handicabs, Inc., *
*
Petitioner, *
*
v. *
*
National Labor Relations Board, *
*
Respondent. *

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Claudia Fuglie, individually *
and o/b/o others similarly *
situated, *
*
Amicus Curiae *

On Petition for Review from the
National Labor Relations Board.

No. 95-3628

Handicabs, Inc., *
*
Respondent, *
*
National Labor Relations Board, *

Petitioner. *
*

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Claudia Fuglie, individually and o/b/o others similarly situated, *
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*
*

Amicus Curiae *

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Submitted: June 12, 1996

Filed: September 11, 1996

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Before BOWMAN, HEANEY, and BEAM, Circuit Judges.

HEANEY, Circuit Judge.

Handicabs, Inc. petitions for relief from an order of the National Labor Relations Board ("Board"), holding that Handicabs violated section 8(a)(1) and (3) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1) and (3) (1994) by (1) maintaining company policies prohibiting the discussion of work related problems with other employees and clients and (2) discharging an employee because of his union activity. The Board cross-petitions for enforcement of its order. We deny Handicabs petition and enforce the order.

I.

Handicabs provides transportation services to disabled and elderly persons in the Minneapolis-St. Paul metropolitan area. On September 20, 1994, Handicabs discharged one of its

drivers, Ronald F. Trail, after receiving a complaint that he had been "talking about the union" with his passengers. The complaint was made by Claudia Fuglie, a Handicabs employee and paying client; Fuglie, who suffers from spine bifida, is wheel-chair bound and dependent on the handicapped-accessible transit service. Fuglie complained that the talk of unionization and potential work stoppage was distressing to her.

Handicabs fired Trail, allegedly for violating its rule prohibiting the discussion of company-related problems with clients. The policy, addendum no. 2 in the employee handbook, states in relevant part, :

> Discussing complaints or problems about the company with our clients will be grounds for immediate dismissal.
> ...
> All of our clients are protected by the Vulnerable Adults Act. According to this law, you must not tease them, take monies (other than ride-fare or tip) from them, curse or use profanity while in their presence, or do anything verbal or physical of a sexual nature. Also, you must not put these people in a threatening or uncomfortable position by discussing any personal or company-related problems that may make them feel coerced or obligated to act upon or react to.

Petitioner's App. at 197 (emphasis added). In addition, Handicabs maintained a company policy, addendum no. 1, that prohibited its employees from discussing their wages among themselves, violation of which was also grounds for immediate termination. Id at 199.

In response to his termination, Trail filed an unfair labor practice charge with the Board. The Board issued a notice of hearing and complaint against Handicabs, which alleged that

the company discharged Trail because of his union activity.[1] The Board also contended that Handicabs' policy prohibiting employees from discussing employment concerns with clients violated section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3), because it interfered with employees' rights to "self-organization, to form, join, or assist labor organizations . . . and . . . to engage in other concerted activities for the purpose of collective bargaining," guaranteed under Section 7 of the Act, 29 U.S.C. § 157.

II.

After a hearing, an Administrative Law Judge issued a decision in favor of the Board. The ALJ held, and Handicabs did not contest, that addendum no. 1, prohibiting the discussion of wages among employees, violated Section 8(a)(1) of the Act. The ALJ also determined that, while Handicabs has an obligation to protect its passengers from abuse and mistreatment, the policy against discussing work-related problems with passengers violated the Act because it was overly broad. Finally, the ALJ decided that because Trail's discharge was motivated by his union involvement and founded on an unlawful policy, it also was in violation of the Act. The ALJ recommended that Handicabs be ordered to rescind its workplace rules and reinstate Trail. After consideration of the parties' exceptions and briefs, the Board affirmed the ALJ's decision and recommended order. Handicabs now petitions for relief from this court.

---

[1] In mid-1994, Trail participated in an organizing campaign of the Handicabs drivers by Miscellaneous Drivers, Helpers & Warehousemen's Union, Local No. 638, I.B.T.. The campaign led to a representation election on October 14, 1994. Trail signed a card authorizing the Union to represent him, passed out authorization cards, and was elected a member of one of the organizing committees.

As a general rule, our standard of review affords great deference to the Board's affirmation of the ALJ's findings. See *Wilson Trophy Co. v. N.L.R.B.*, 989 F.2d 1502, 1507 (8th Cir. 1993). We will enforce an order of the Board if the Board has correctly applied the law and its factual findings are supported by substantial evidence on the record considered as a whole, even though we might have reached a different decision had the matter been before us de novo. Id. Handicabs argues that the Board's findings are not supported by the record and that the decision demonstrates bias on the part of the ALJ against persons with disabilities. After careful examination of the record, we see no reason to upset the ALJ's factual characterizations and credibility determinations. In any event, we need not rely on the disputed facts to resolve this matter: The content of the policies and the relevant facts surrounding Trail's discharge are undisputed. We thus consider each of Handicabs' substantive arguments in turn.

Handicabs concedes that the blanket prohibition of wage discussion among employees contained in policy addendum no. 1 was in violation of the Act. See *Jeanette Corp. V. N.L.R.B.*, 552 F.2d 916, 919 (3d Cir. 1976) (an unqualified rule barring wage discussions among employees constitutes a violation); *Waco Inc.*, 273 N.L.R.B. 74, 118 L.R.R.M. 1163, 1166 (1984). Handicabs argues only that there is no need to enforce the portion of the Board's order that addresses this violation because the company unilaterally agreed to change the policy shortly after the hearing. Because Handicabs did not raise this defense before the Board, however, we may not consider it under section 10(e) of the Act, 29 U.S.C. § 160(e) (1994). See *Woelke & Romero Framing, Inc.* v. N.L.R.B. U.S. 645, 665-6 (1982). Accordingly, we summarily enforce (affirm) the Board's order regarding addendum no. 1.

With respect to policy addendum no. 2, Handicabs vigorously contests the Board's determination that it violates the Act. Handicabs asserts that the policy is designed to meet the special needs of its clients. Handicabs argues that the Board's decision ignored the company's responsibility to protect the "enjoyment" of transportation as federally mandated by the Americans with Disabilities Act, 42 U.S.C. § 12203(b) (1994) ("ADA"), and to prevent harassment or abuse of its passengers as required by the Minnesota's Vulnerable Adults Act, Minn. Stat. § 626.557, sub. 2(d)(2) (1995). Handicabs also contends that because its clients "are not necessarily able to handle stress or difficulty in the manner of a nondisabled person," Handicabs' Br. at 25, it should be permitted to enforce a more stringent no-solicitation rule to protect them, as the hospitals were permitted to do for its patients in *N.L.R.B. v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979) and *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483 (1978). Finally, Handicabs argues that its policy, limited in time and space to when drivers are transporting clients in the Handicabs vans, is analogous to the no-solicitation rules upheld by the Board for restaurants and retail stores *see e.g.*, *McDonald's Corp. and I.L.W.U. Local 142*, 205 N.L.R.B. 404 (1973), and thus permissible under the Act.

Contrary to Handicabs' assertions, the Board recognized that Handicabs has a responsibility to protect persons with disabilities from harassment or harm. Neither the Board nor this court disputes the legitimacy or importance of this concern. The Board also agreed that some words and conduct cause greater distress for persons with disabilities than those without, thereby recognizing that there may be a need to prevent the discussion of topics that cause Handicabs' passengers harm. Yet, the Board stated that work rules intended to address these concerns must be narrowly tailored to avoid unnecessary deprivation of employees' statutory

rights. Because Congress and the courts rely on the Board to strike the appropriate balance between such conflicting legitimate interests, we review the Board's decision with respect to whether Handicabs has violated the Act only for consistency and rationality. *See Beth Israel Hospital*, 437 U.S. at 501.

The Board determined that the company's policy was too broad. The first part of addendum no. 2 forbids all discussion of working conditions with clients even if the communication were intended to enlist their support for protected concerted activity. The Board also decided that the second part of the policy is too far-reaching because it conditions violation of its rule on the subjective reaction of the passengers--the discussion of company-related problems that "may make [passengers] feel coerced or obligated to act upon or react to." The subjective standard potentially prevents employees from discussing any aspect of a labor dispute and from appealing for support from the public for fear that a single client may feel threatened or uncomfortable. Neither part of the policy is limited in time or place, as Handicabs has argued; rather the policy broadly prohibits all discussions with clients about company complaints. As the Board concluded:

So broad a prohibition hardly strikes a reasonable balance between protection which Congress sought to extend to the handicapped and challenged segment of the public and the rights which Congress sought to provide for employees under the Act, particularly in an overall prohibition which begins with an expressed warning of "immediate dismissal" for discussion with clients of "complaints or problems about the company[.]"

Petitioner's App. at 7.

The Board's discussion of the important interests in this case is well-reasoned and strikes an appropriate balance between Handicabs' responsibility to its passengers and the employees' rights under the Act. Thus, strictly reviewing the Board's decision under existing labor law, we defer to the Board's decision that policy addendum no. 2, as currently written, violates the Act because its prohibition of protected organizing activity is too extensive.

As a separate matter, we hold that the Board's decision under the Act does not violate or conflict with the ADA or the Minnesota Vulnerable Adults Act. The Board's decision does not prevent or even discourage Handicabs from taking the appropriate steps to protect its passengers. It simply informs the company that it cannot blatantly trample its employees' rights with a rule that speaks generally of protecting passengers yet targets only the discussion of company-related problems. The Board's decision leaves open the opportunity for Handicabs to design a neutral rule that does not single out activity protected under the Act, but rather focuses on all speech and conduct that harms its passengers. Handicabs' impermissible generalization about persons with disabilities--that all persons who ride handicapped-accessible, public transit services will be disturbed by talk of union activity cannot bring its policy under the protection of the disability laws. Because the Board's decision does not violate or conflict with these laws, we also enforce the Board's order with respect to addendum no. 2.

Finally, Handicabs challenges the Board's ruling that the company violated section 8(a)(1) and (3) of the Act by discharging Trail. Handicabs asserts that it fired Trail because of his misconduct, not his union activity. The Board listed many reasons to support its decision to the contrary. First, while the company may not have been aware of Trail's union

activities prior to the day they fired him, Fuglie's complaint apprised them of Trail's involvement. Second, when Handicabs fired Trial, he was the only employee the company knew or suspected was involved in union organizing. Third, Handicabs fired Trail shortly after they learned of this involvement and just twenty-four days before the union's representation election. Finally, Handicabs did not provide Trail with an explanation for his discharge and did not give him any opportunity to respond to the allegations. In fact, the company did not engage in any independent investigation of the charges; it relied solely on Fuglie's complaint. Under these circumstances, we are unable to say that the Board's finding of unlawful discharge is not supported by substantial evidence. Moreover, because policy addendum no. 2 is invalid and cannot be enforced, Handicabs' "lawful" justification for Trail's discharge under that rule lacks merit. See *Jeannette Corp.*, 532 F.2d at 920. Accordingly, we enforce the Board's order requiring Handicabs to offer Trail immediate and full reinstatement, provide him with back pay and lost benefits with interest, and remove from its files any reference to the unlawful discharge.

III.

Based on the foregoing, we grant enforcement of the Board's order in all respects.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES
COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3352/3628 Handicabs, Inc.,

Petitioner,

vs .

National Labor Relations Board,

Respondent.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en bane is denied. The petition for rehearing by the panel is also denied.

November 26, 1996

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth
Circuit

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Handicabs, Inc. and Ronald F. Trail. Case 18-CA13287

August 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On May 5, 1995, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[2], and conclusions and to adopt the recommended Order.

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[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. However, we find it unnecessary to rely on the judge's comment about Claudia Fuglie's ability to obtain employment given her physical disability.

We also find without merit the Respondent s allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Handicabs, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order. Dated, Washington, D.C. August 31, 1995

William B. Gould IV, Chairman

Charles I. Cohen, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Polly Misra and Marlin O. Osshus, for the General Counsel. Errol K Kantor and Charles A. Beckjord, of Minneapolis, Minnesota, appearing for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANIER III, Administrative Law Judge. I heard this case in Minneapolis, Minnesota, on February 6, 95. On October 27, 1994,[1] the Regional Director for Region 18 of

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demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

[1] Unless stated otherwise, all dates occurred during 1994.

the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on September 21, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed, and on my observance of the demeanor of the witnesses, I enter the following

## FINDINGS OF FACT

### 1. THE ALLEGED UNFAIR LABOR PRACTICES

This case presents issues concerning the lawfulness under e Act of certain work rules and, also, concerning the motivation for discharging an employee on September 20. Handicabs, Inc. (Respondent) is one of three providers of transportation services for vulnerable adults--senior and disabled persons--in the Minneapolis-St. Paul metropolitan area for what is called the Metro Mobility system. It is a corporation which, in the course and conduct of providing transportation for vulnerable persons during calendar year 1993, derived gross revenues in excess of $500,000 and, further, purchased and received each month, at its Minneapolis place of business, approximately $40,000 of gasoline which originated outside of Minnesota. Therefore, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

A handbook has been distributed to each of its employees by Respondent. Company policy addendum no. 1 of that handbook states, inter alia:

> Because [Respondent] assigns a salary range based on the duties and responsibilities of each position, wages should not be discussed among the employees. Discussion of wages is grounds for immediate termination.

The General Counsel contends that this rule violates Section 8(a)(l) of the Act. In its brief, "Respondent . . . admits that this language is in violation of Section 7 of the Act," and does not argue . . . that this particular policy is defensible." Therefore, without the need for further discussion, I conclude that by maintaining that portion of addendum no. 1, Respondent violated Section 8(a)( 1 ) of the Act. *Waco, Inc.*, 273 NLRB 74 (1984).

Also included as part of Respondent's handbook is company policy addendum no. 2. According to the General Counsel, the italicized portions of the following quoted sections of that addendum also violate Section 8(a)(1) of the Act:

> Discussing complaints or problems about the company with our clients will be grounds for immediate dismissal.

VULNERABLE ADULTS ACT (Minnesota Statute 626.557):

All of our clients are protected by the Vulnerable Adults Act. According to this law, you must not tease them, take monies (other than ride-fare or tip) from them, curse or use profanity while in their presence, or do anything verbal or physical of a sexual nature. Also, you must not put these people in a threatening or uncomfortable position by discussing any personal or company-related problems that may make them feel coerced or obligated to act upon or react to. Charges can and have been brought against drivers in the past for some of

these types of situations. These acts are cause for immediate termination.

Respondent argues that these prohibitions are necessary for the protection of passengers who, by virtue of their ages and disabilities, are in a position akin to that of hospital patients, whose situation was addressed in *NLRB v. Baptist Hospital. Inc.*, 442 U.S. 773 (1979), and in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). Its clients, urges Respondent, "are not necessarily able to handle stress or difficulties in the manner of a non-disabled person," and, as a result, it should be allowed greater latitude to formulate and implement a more stringent, albeit limited, "no-solicitation" rule intended to protect passengers from speech and action which might be upsetting, even threatening, to them:

> The concern that the Supreme Court had in regard to hospital patients are closely present in Respondent's business. Clients often use [Respondent] to get to medical facilities.... Even if Metro Mobility clients are not using the service for a medical appointment, however, they are not necessarily able to handle stress or difficulties in the manner of a non-disabled person. The State of Minnesota has recognized the right of these persons to be protected from speech and actions that would not constitute abuse towards a healthy person without disabilities

The alleged unlawfully discharged employee is Ronald F. Trail. Prior to his September 20 termination he had been employed continuously by Respondent as a driver since February of 1991. During the late spring or early summer of 1994 Trail became active in an organizing campaign, conducted among Respondent's drivers by Miscellaneous Drivers, Helpers & Warehousemen's Union, Local No. 638,

I.B.T. (the Union),[2] and leading to a representation election conducted on October 14. Thus, Trail signed a card authorizing the Union to represent him, was elected a member of one of the organizing committees, and passed out authorization cards to other drivers to whom he spoke on the Union's behalf.

When he returned after work during the late afternoon or early evening of September 20, Trail was discharged by Driver Supervisor Gary Nord, an admitted statutory supervisor and agent of Respondent. According to Trail, Nord said that he had to terminate Trail because "we've got a complaint against you," but when Trail asked who had complained, Nord replied, "I can't tell you," and asked, "Why do you want to know, so you can harass her some more?" Trail testified that he responded, "No, I don't want to harass anybody. I want to know what the complaint is so I can answer the complaint to these charges," but Nord replied, "No, I can't do that. Everything is locked up in the office." When he then asked for "something in writing or something that tells me about this," testified Trail, Nord started writing out something on a piece of paper, but then, "Scribbled it out and said, 'No, I can't do that. I don't have authority to do that.'" Instead, Nord photocopied company policy addendum no. 2 and said that was the only thing he could give Trail.

As Nord was making the photocopy, Trail went to his company mail slot. There he discovered a copy of a memorandum from Nord to "All Drivers," dated "9-20-94," regarding the subject of "Discussions With Passengers." That memorandum reads:

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[2] At all material times the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

> It has been brought to my attention that some passengers have complained that drivers have been hassling them with complaints and problems regarding potential unionization. This behavior violates our company policy. In accordance with the policy the appropriate disciplinary action is dismissal. Many passengers are scared and fearful that unionization would mean a strike and loss of service for their transportation needs. It also can be very threatening to some passengers to be involved in internal [Respondent] matters. Therefore, regardless of your personal beliefs regarding this union thing, please do not trouble our passengers with your problems. Failure to comply with this policy will result in immediate dismissal.

The General Counsel alleges that Trail's discharge had been motivated by his statutorily protected concerted activities on behalf of the Union, as well as by a motive to discourage other employees from engaging in such activity. Indeed, in the representation election, conducted 24 days after that discharge, a majority of those who cast ballots voted against representation by the Union. However, Respondent challenges those motivation allegations, asserting in its brief "that Mr. Trail was properly discharged for violating Minn. Stat. 626.557, causing distress to vulnerable adults in violation of that act," as recited in the above-quoted section of company policy addendum no. 2.

Consistent with Trail's above-described account, Nord agreed that, during the September 20 termination discussion, he had given Trail a copy of addendum no. 2. In fact, Nord did not dispute any aspect of Trail's description of their conversation that late afternoon or early evening. For, with respect to that conversation, Nord testified only:

> I told him that he had violated the Vulnerable Adults Act, gave him a copy of the--of the company policy that it

related to. He asked me for names of who was doing--of who had alleged--what [sic] had said he committed the violations, and I told him that I could not give him the names for fear of reprisal.

Aside from Nord, Respondent presented two other witnesses who were involved in, and testified about, the sequence of events on September 20 which culminated in Trail's discharge. One is Respondent's President, Joyce Doerrfler, an admitted statutory supervisor and agent of Respondent. The other is Claudia Fuglie, an employee of Respondent who described her job as a "reservationist. I take orders, write orders from passengers. Make sure that their times that they need for a ride is available to them. Make sure that the routes are, you know, within their time slot and stuff." In addition to working for Respondent, Fuglie rides its buses as a passenger, because "I have spina bifida and I'm paraplegic, paralyzed from the waist down."

By way of overview, these three witnesses testified that Fuglie made a report to Nord early on September 20; he related the substance of that report to Doerffler who, in turn, spoke with Fuglie; Doerffler and Nord then made the decision that Trail should be discharged; and, Nord implemented that decision when Trail returned to Respondent's facility at the end of his workday. Yet, when the accounts of these witnesses are analyzed and compared, their generalized straight-forward sequence of events on September 20 unravels. Left is a strand of indicia, including contradictions between accounts and with objective considerations, which serve to reinforce the allegation of unlawful motivations for the discharge of Trail, rather than supporting Respondent's defense.

The perhaps most obvious illustration supporting that conclusion arises in connection with the analytical element of knowledge, or suspicion, by Respondent of Trail's union

sympathies and activities. Doerffler testified during direct examination that, when the decision to fire him had been made, after she had spoken with Fuglie on September 20, she had no knowledge of Trail's union activities:

Q. On September 20 or prior to that did you as CEO or head of the company, owner, or president, whatever, have any knowledge of Mr. Trail's union activity?

A. No.

. . . .

[Q.] On September 20th were you aware that Mr. Trail was trying to organize the drivers?

A. No. And until today was I made aware of that.

Q. All right. So in your own--in your own decision to fire Trail was violation of the policy addendum two and nothing to do with his union activities?

A. Nothing.

Q. You weren't aware of them?

A. No. Totally not.

Nord supported Doerffler's above-quoted denials: "I have no knowledge that Joyce knew anything of Mr. Trail's activities. . . .regarding a union" at the time of "the determination that we would need to dismiss Ron Trail[.]" Yet, that denial, and those of Doerffler as well, were not consistent with Respondent's own evidence concerning the sequence of events on September 20.

As discussed in greater detail below, Fuglie testified that in the course of taking her home on the bus each day, Trail had complained frequently to her about certain aspects of his job. Those complaints, she testified, caused her to become "very upset and very concerned because when you come up with a conversation like that with a driver you begin to wonder what the office is like. What the job [is] like." In addition, testified Fuglie, during the weekend preceding

September 20, "I had gotten some phone calls from other passengers who were concerned about the conversations that were going on the buses or on the vans" with Trail. "I finally had enough of it," she testified, "and so I went to Gary Nord and asked him, you know, can you--you know, I've had enough of this. Can you see what you can do." She claimed that because of her fear of "[r]etaliation," she identified neither the name of the driver nor the names of the other passengers to Nord during that conversation. According to Fuglie, Nord "said he would look into it," and she then went to work.

That was the extent of Fuglie's testimony during direct examination regarding her conversation with Nord during the morning of September 20. Questioned during cross-examination about the words she had spoken to Nord that morning, however, Fuglie acknowledged that she had told Nord that her concern had been "that there was talk about the [U]nion," and that she "wouldn't be surprised if he received phone calls from other passengers about this union issue[.]" Furthermore, Fuglie conceded that, on that day, she had not told Nord of any other concerns about Trail that she "had other than there being talk about the [Union...." In other words, not only did Fuglie report specifically to Nord that Trail had been talking about the Union, but she made no report to Nord on September 20 respecting complaints about employment with Respondent that Trail may have uttered to her prior to that date.

Indeed, Nord concurred that Fuglie's complaint on that date had centered only on the possible effects of unionization of the drivers. Thus, he testified that, when she had approached him "early in the morning. My guess is 7 o'clock or so," Fuglie

> told me that she had heard from several passengers over the weekend that they are very threatened and scared about the potential for work stoppage that

> might occur with a union, that the drivers have been telling them that there is going to be a work stoppage, and that they were very fearful that having just undergone a work stoppage less than a year prior that-- a system breakdown rather, rather than a work stoppage, a system breakdown a year prior--that they were concerned that a similar thing was going to occur again. [Emphasis added.]

The system breakdown mentioned in that testimony pertained to a situation during the latter half of 1993, when transportation of vulnerable adults in the metropolitan area so badly broke down that the National Guard was eventually called in to operate the system.

Asked specifically during direct examination if Fuglie's conversation with him had "include[d] other things besides these threats about the [Union," Nord answered, "The threats were more of work stoppage in nature than anything about a union." He identified no other conduct nor remarks by Trail, about any other subjects, which had been mentioned by Fuglie during that 7 a.m. conversation. Accordingly, assuming arguendo that Trail had voiced general complaints about employment to Fuglie, while she had been a passenger in his bus, those complaints had not been a subject of the report which she made to Nord on September 20.

As had Fuglie, Nord testified that, when he asked "who these passengers were or who the drivers involved were" (emphasis added), she had refused to identify them because there might be "reprisals," and he had told her that he would look into the matter.

"I considered [Fuglie's expressed concerns to be serious concerns of Claudia[ ]," testified Nord. So, when Doerffler arrived at work later that morning, he "told Joyce what Claudia had told me and said that maybe she would be more forthcoming if you talk to her." Similarly, Doerffler testified

that when she had shown up for work that morning, Nord came to me almost immediately and said, "Boy, we've got trouble now. Apparently the passengers are being made to feel really threatened and uncomfortable. Claudia got a lot of phone calls at home this weekend." And [I] said, "Well, who is it" and he says. "She won't tell me." And I said, "Well, I'll talk to her and see if I can get any information."

Fuglie and Doerffler each described a conversation which then had ensued between them. The latter testified that the conversation had taken place "in the ladies restroom." During direct examination, Fuglie testified initially that it had taken place "at my desk." But when it was then suggested "I understood that you went into the ladies room so nobody could see the two of you," Fuglie answered hastily, "Oh. that too." Yet, Doerffler described only a single conversation with Fuglie that day. And, Fuglie described the substance of only a single conversation with Doerffler on September 20. As a result, there simply is no basis for concluding that the two women had engaged in one conversation "at [Fuglie's] desk" as Fuglie testified initially, and that a conversation between them occurred "too" in the ladies' restroom, as Doerffler testified and as Fuglie testified after being prompted.

As to the substance of what Fuglie had said to her, Doerffler testified that, after identifying Trail, Fuglie said

> that he made her feel very threatened and uncomfortable complaining about the company, threatening that the drivers were going to walk out union or no union I said, "Well, if he doesn't like his job so much why doesn't he quit" or something like that, and she says, "I don't know but I've asked him to stop talking. He doesn't and now people I know are hearing the same conversations. I'm really getting upset and nervous about it."

To be sure, Doerffler's account places some distance between possible unionization of the drivers and asserted fear caused to passengers by Trail's supposed work-related remarks to them. That is, her description of Fuglie's statements simply enfolds mention of a union into an overall general description of purported complaints about Respondent's employment by Trail to passengers,

Still, as pointed out above, Fuglie had not reported that morning to Nord any remarks by Trial other than ones pertaining to "talk about the [Ulnion." Nothing in the record supports an inference that Fuglie would have been naturally disposed to add to her initial report other subjects when later speaking with Doerffler. And any such inference would be at odds with Fuglie's ultimate testimony regarding the substance of what she reported to Doerffler on September 20, although she did inject a somewhat internally inconsistent account.

During direct examination, Fuglie provided only a sketchy description of what she had reported about Trail to Doerffler on September 20. Thus, she testified that she had mentioned "the problems we are dealing with and stuff," and agreed that she had disclosed to Doerffler "all these things we've been talking about," such as her "fears of shutting down" and "threats of whatever happened[.]" Then, in the course of testifying during cross-examination about purported complaints to her by Trail concerning Respondent's treatment of employees--yelling at employees and back-stabbing--Fuglie claimed that she also had reported those supposed statements to Doerffler before Trail had been discharged.

However, when asked during redirect examination if her September 20 conversation with Doerffler had included Trail's "conversation other than the union and things he discussed with you," Fuglie's answer effectively denied that such "other" purported remarks by Trail had been related to Doerffler during that particular conversation: "Basically talked to Joyce about the concern of the [Union because I was listening to

things that were very unpleasant." Not only did that testimony refute Doerffler's "testimony that Fuglie had reported complaints by Trail about his employment with Respondent, but it obviously also contradicts Doerffler's above-described denials of knowledge about Trail's union involvement--or, at least, sympathies--when the decision to discharge him had been made later that same day.

That occurred following Doerffler's conversation with Fuglie. During a discussion with Nord, testified Doerffler, the determination was made to fire Trail and responsibility for doing so was delegated to Nord. Both testified that they had reached that determination because Trail's remarks to passengers, as related by Fuglie, had violated the Vulnerable Adults Act portion of company policy addendum no. 2. Indeed, in contesting Trail's claim for unemployment benefits, Respondent advanced that contention and its position was upheld by the Minnesota Department of Economic Security's Representative of the Commissioner. In his decision, the representative made a specific finding that:

(6) The claimant was discharged by the employer due to discussing work-related problems and union activity with the employer's passengers. The claimant's discharge was pursuant to the employer's policy which provided for immediate discharge in such cases.

As discussed in section 11, infra, Respondent moves to dismiss the discrimination allegations of this proceeding on the basis of the result reached in that state proceeding.

Given that state determination and the motion based on it, as well as the motivation defense advanced in this proceeding, it is necessary to examine the contention that Trail's discharge had been motivated, at least in part, by complaints about working conditions which he supposedly had made to passengers. At the outset, there is no reliable

evidence that Doerffler and Nord had even been aware of such conduct by Trail at the time that the two supervisors determined to discharge him.

Only in Doerffler's description of what Fuglie had said on September 20 is there any somewhat clear reference during conversations that day to Trail complaining about the company[.]" However, as discussed above, that testimony was ultimately refuted by Fuglie. To be sure, she mentioned having reported to Doerffler such work complaints by Trail before he had been discharged. But when that particular testimony was followed up during redirect, Fuglie reversed field and testified, "Basically talked to Joyce about the concern of the [Union" on September 20.

Fuglie testified that her initial report to Nord had been "that there was talk about the [Union" and that she had not reported any other concern to him. Nord agreed that this had been the only subject of Fuglie's report, although he characterized her concern in terms "of work stoppage [rather] than anything about a union." But he never claimed that Fuglie had said anything about Trail, or any other driver, complaining to passengers about their conditions of employment by Respondent. Nor did he testify that he and Doerffler had discussed such a subject in reaching their discharge termination. In fact, neither did Doerffler do so. Finally, a review of Nord's above-quoted "9-20-94" memorandum shows that it pertained to "complaints and problems regarding potential unionization." not to "complaints and problems" about working conditions, in general.

It is settled that "it is settled that the mere existence of a valid ground for discharge is no defense to an unfair labor practice charge if such grounds was a pretext and not the moving cause." *NLRB v. Yale Mfg. Co.*, 356 F.2d 71 (1rst Cir. 1966). Accord: *Singer Co. v. NLRB*, 429 F.2d. 172, 179 (8th Cir. 1980); *NLRB v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964); *NLRB v. Adam Loos Boiler Works Co.*,

435 F.2d 707 (6th Cir. 1970). Inasmuch as there is no evidence that Doerffler and Nord had ever been aware on September 20 of supposed complaints by Trail to passengers about dissatisfaction with employment by Respondent, much less that they had discussed and considered that subject in reaching their decision to fire Trail on that date, Respondent cannot now rely on such purported remarks to passengers to buttress its defense.

In fact, with one exception, Trail denied expressly that he had initiated or participated in conversations with passengers regarding his wages, benefits, or working conditions, and further denied that he had ever discussed with passengers his own complaints about work at Respondent. Moreover, he testified that whenever passengers complained about the service, usually about scheduling which caused them delays, he would "refer them to the company to call the office and have them explain it to you," since those were not "complaint[s] I can deal with."

The lone exception to Trail's denials pertained to Fuglie. She rode regularly with Trail and was the only employee of Respondent to do so. As they rode together, he testified, they would converse,

> just about anything. We'd talk about weather for one thing or how her day went in the office, if there was any--anything going on after work where she would be going to do something after work, or if I was going to do something after work we'd talk about that, or about our families or if we had friends in common we'd talk about things like that.

Only twice he testified did he discuss the Union with Fuglie.

The first occasion had occurred in August, Trail testified, when Fuglie raised the subject by saying that "the people in the office were wondering how this union thing was going to turn

out." When he asked why she wanted to know that, testified Trail, Fuglie replied, "Well, we're wondering if we're all going to have jobs and that the drivers aren't going to be getting their hours if there is a union voted in because [Respondent] won't be able to pay for the overtime and hours will be cut back." According to Trail, when he asked how Fuglie knew that, she responded, Well, Joyce and Harlan [Peterson] said so." He testified that he had assured her, "I don't think that would happen. I can't see that."

The second occasion when the Union was mentioned during a conversation between them, he testified, occurred during the week prior to his discharge, "right after work at about 3:30 at [Respondent's] garage." He testified that he had asked Fuglie if she was aware of Respondent's profit sharing plan and if she had been offered an opportunity to participate in it. When she answered no to both questions, testified Trail, he explained that he had been told about such a plan when he started working for Respondent, but when he later questioned whether he could participate in the plan, he had been told that there were no profits, so there would be no profit sharing.[3] According to Trail he then said to Fuglie:

> Well, that's some kind of unequal treatment there, being told one thing and not being given it or others have been told things and not given them, and the fact that drivers were doing the same job and getting paid different wages even though some had been there longer and getting less than drivers that were hired since them. You know, those were

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[3] Doerffler testified Respondent had disbanded that plan and had distributed the profits to qualified employees. She further testified that Trail's money had not been collected by him. Having worked for Respondent 3-1/2 years, she estimated that the amount available to him is "only about $11.00[.]"

> inequities that could be changed ff the [Union was voted in.

Fuglie was the primary witness called by Respondent to supply evidence regarding the assertions that Trail had com plained to passengers about his job. During the summer and fall, she testified, he had complained "three, four times a week," as he drove the bus, about unhappiness with the routes, the manifests, his pay and being overworked, and also had said that "they could yell at you" and that Doerffler "could be a bitch if she wanted to and also watch my back because I didn't know, you know, if they were going to yell at me or terminate me out of the clear blue." Moreover, she testified,

> He had mentioned one time that drivers would walk out because they were not happy with what was going on. They were not happy with their wages and the routes and that they were pushed to do more than what they could do, and they could have walked out [with or without a union].

Trail denied having conversed about the Union with Fuglie on any occasion other than during the two above-described conversations concerning which he testified. Significantly, Fuglie never denied that those conversations had occurred and that the remarks recited by Trail had been exchanged between them. Further, there were certain other aspects of her testimony which reinforce doubts regarding her candor that arose as she was testifying.

First, Fuglie was vehemently opposed to unions and, by extension, unsympathetic to activities of those who supported them. That was amply demonstrated by the following sequence of questions and answers when she testified:

Q. I think I did ask but I want to make sure. You weren't of the class to be unionized?
A. No.
Q. And so Ron didn't ask you to sign a union card?
A. No.
Q. And there was really no reason for you to have discussions with Ron--
A. No.
Q. --about the union?
A. And I probably would have ripped it up.
Q. But be that as it may--
A. Right.
Q. -you weren't-
A. I wasn't part of it and I didn't want to hear it.

The vitriol which can be implied from those answers does not begin to fully portray the bitterness Fuglie displayed in uttering those answers. It was my impression that she was fully willing to tailor her accounts of events to disadvantage a supporter of any union to the greatest extent possible.

Second, Fuglie was not reluctant to take advantage of any opportunity to point out her dependence on bus drivers, such as Trail, when being ridden to and from work. That dependence is obvious.[4] Still, there is another aspect to her situation: Fuglie is self supporting and, thus, dependent upon Respondent for continued income from employment. It is not easy for someone in her position to obtain employment. As a result, it should not be surprising that she would be disposed

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[4] Lest someone raise the point, as I advised the parties during the preheating conference call, I am blind in one eye. Some say that, in due course, I may lose sight in the other one. Consequently, it can hardly be maintained with persuasion that I am not sensitive to the plight of vulnerable persons unless, of course, one is prepared to grade disadvantages of various handicaps and challenges.

to take whatever measures she deemed necessary to assure that she retained her current job.

Third, very little supporting evidence was provided for Fuglie's accounts of purported ongoing complaining remarks by Trail which upset passengers riding his bus. Of course, that might be because those passengers were fearful to come forward and identify themselves, as Fuglie claimed. But one of them--Jan Snook--did appear as a witness. Her testimony did not support that of Fuglie.

The latter testified that Snook had been one of the individuals who had complained to Fuglie and that Snook had "voice[d] the same concerns that [Fuglie] voiced" to Respondent. But when Snook appeared as a witness, she testified that she had told Fuglie, "I remember sometimes over the concerns but I keep my mouth shut." At no point did Snook describe any telephone call that she had placed to Fuglie during the weekend preceding Trail's discharge.

More importantly, asked about what Trail had said in her presence, while she rode as a passenger on his bus, Snook testified merely, "I remember one day riding home he had a lot of people to pick up" and Trail had complained "about being overbooked but that's all I remember." Given the fact that, as described above, Trail occasionally encountered passenger complaints about,delays caused by scheduling, it does not seem unusual that he might have voiced concern on a particular occasion about being over booked. However, that single remark hardly rises to the level of the types of complaints attributed to Trail by Fuglie--hardly demonstrates criticism of Respondent that would likely cause a vulnerable passenger to become fearful.

Fourth, Fuglie's testimony raised certain inherent timing concerns. As set forth above, she claimed that Trial had been complaining to her since summer. Yet, for some reason never explained, she did not relate any of his supposed remarks to Respondent's officials until the representation election

approached and the possibility of representation for drivers became a realistic possibility.

Further, there is no evidence of any incident involving Trail that would appear to explain a sudden spate of calls to Fuglie by other passengers during the weekend preceding September 20. Absent such an explanation, it seems highly unusual that a number of people would suddenly make independent decisions to telephone Respondent's reservationist, at her home, to voice identical concerns. Of course, that might be explained by the approaching representation election and the fact that other passengers, like Fuglie, were becoming concerned that the drivers' selection of a bargaining agent could lead to a work stoppage, should subsequent bargaining fail to yield agreement, that could leave those passengers without transportation, as happened to them during 1993.

Had those telephone calls to Fuglie actually been made during that weekend, it is puzzling that she had not made her report to Respondent about them until the second workday following that weekend. Throughout the hearing Respondent referred to September 20 as a Monday. But examination of a 1994 calendar reveals that September 20 fell on a Tuesday during that year. Obviously, Respondent could not change the date of which it had discharged Trial. So, in constructing their defense, its witnesses appear to have tried to bluff through the actual day of the week on which that date occurred, by portraying it as a Monday and, apparently, hoping that no one would notice. Notice of that fact, however, leave an intervening workday between that weekend and the day of which Trail was discharged, with no explanation of why, had she actually received calls from other passengers during the weekend and had become concerned, Fuglie did not make her report on the first workday after that weekend.

On the basis of Fuglie's testimony, she had complained only about Trail. However, as the italicized portions of Nord's

testimony reveal, he described her as having reported passenger calls to her about "drivers," plural. This was not a mere one-time possible reportorial error. For when Nord described having asked Fuglie to whom she was referring, Nord again used the plural: "drivers." Furthermore, he used that same plural--"drivers have been hassling them"--in his above quoted "9-20-94" memorandum, issued on the same day as Trail was fired. These particular facets of Respondent's evidence gives rise to at least a respectable alternative inference that passengers had been concerned about a possible work stoppage should the drivers become represented, that Fuglie had related that concern to Respondent's officials and had identified Trail as a union supporter--or likely supporter--based on his above-described comment to her during the preceding week, and that Respondent fired him as a warning to other drivers when they cast their ballots in the representation election conducted 24 days later. That is, that by discharging Trail, Respondent could "so extinguish seeds, [that] it would have no need to uproot sprouts." *Ethan Allan, Inc. v. NLRB*, 513 F.2d 706, 708 (1rst Cir. 1978).

## DISCUSSION

Turning first to the portion of company policy addendum no. 2 italicized in section 1, obviously Respondent has an obligation to protect passengers from abuse and mistreatment by drivers. Nevertheless, nothing in the public service provisions of Americans with Disabilities legislation, 42 U.S.C. § 12101 et seq., provides for modification of rights guaranteed employees by the Act. Moreover, one purpose of those public service provisions is "elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), not to promote further patronization of them.

To be sure, some words and conduct do cause greater concern for a vulnerable person than is the fact for other

individuals. Still, any work rules intended to address such greater concerns must be narrowly tailored to avoid unnecessary deprivation of employees' statutory rights.

As a general proposition, employees do not "lose their protection under the 'mutual aid or protection' clause [of Section 7 of the Act] when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1987). That protection can be lost whenever employee communications to third parties do not relate to labor practices of the employer, such as disparaging the employer's reputation or quality of its product, or whenever those communications are maliciously motivated. See generally, *NLRB v. Local 1229 IBEW (Jefferson Standard)*, 346 U.S. 464 (1953). But the portions of addendum no. 2 italicized in section I are not limited to those types of communication.

Nor, for that matter, are those italicized portions narrowly drafted so that Respondent's prohibitions are confined to driver communications intended to threaten or cause passengers to become apprehensive, and to communications naturally likely to have that effect. Instead, the first pertinent rule is that addendum imposes a flat prohibition on, "Discussing complaints or problems about the company with our clients," adding that such communications "will be grounds for immediate dismissal."

True, the second italicized portion of addendum no. 2 is somewhat less sweeping, in that it is confined to "personal or company-related problems that may make [clients] feel coerced or obliged to act upon or react to." Still, the standard which it imposes is a subjective one: it literally conditions violation of its prohibition on the subjective reaction of the passenger. Such a standard presents an inherent danger to the exercise of drivers' statutory right to communicate "through

channels outside the immediate employee-employer relationship." Ibid.

For example, although there is no reliable evidence that Trail or any other driver maliciously threatened a work stoppage as a means of frightening Fuglie or any other passenger, work stoppages are one obvious possible consequence of collective bargaining. I have no doubt that Fuglie understood that fact and was apprehensive concerning the impact of any strike on her ability to obtain transportation. But that is an apprehension shared generally by all passengers on any form of transportation employing represented employees. Indeed, it is a normal concern of every customer of a business with represented employees. However, Congress has not seen fit to restrict the right to strike of employees working for enterprises which serve the handicapped and challenged.

Furthermore, absent a showing of intention to deliberately frighten the latter through statements about possible strikes which has not credibly been shown here--nothing prohibits employees providing service to that sector of the public from mentioning the possibility of, or intention to, strike, incident to attempting to "improve their lot as employees through channels outside the immediate employee-employer relationship." Id. Yet, by its terms, that is precisely what is forbidden by the terms of the second italicized portion of company policy addendum no. 2, at least so long as a single passenger, such as Fuglie, subjectively "feel[s] coerced or obligated to act . . . or react to" statements about the possibility of a strike.

Beyond strike statements, that particular rule is worded so broadly that it potentially prevents employees from publicizing any aspect of a labor dispute with Respondent, and from appealing for support from the public, for fear that a single client may come to feel threatened or uncomfortable. So broad a prohibition hardly strikes a reasonable balance

between protection which Congress sought to extend to the handicapped and challenged segment of the public and the rights which Congress sought to provide for employees under the Act, particularly in an overall prohibition which begins with an expressed warning of "immediate dismissal" for discussion with clients of "complaints or problems about the company[.]" The breadth of both italicized portions of company policy addendum no. 2 is too extensive. The one expressly prohibits statutorily protected activity; the second inherently does so. Therefore, I conclude that those sections of addendum no. 2 violate Section 8(a)(1) of the Act. *Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987); *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990).

Turning to the motivation for Trail's discharge, prior to the hearing Respondent filed a motion to dismiss--renewed during the hearing--on the basis of the decision issued by the representative of the commissioner, mentioned in section 1. That decision, argues Respondent, addressed the issue of whether Trail had engaged in misconduct, concluded that he had done so, and, accordingly, resolved the motivation issue by holding that Trail "was discharged for misconduct." Therefore, Respondent contends, the complaint concerning that allegation should be dismissed, because the motivation for discharging Trail has already been resolved.

In Section 10(a) of the Act, however, Congress provided that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." The Board has held specifically that state determinations of misconduct, disqualifying alleged discriminatees from receiving unemployment benefits, are not controlling in proceedings arising under the Act. That type of decision is "rendered under a statute with different definitions, policies and purposes," *Garrison Valley Center, Inc.*, 277 NLRB 1422 fn. 1 (1985), and decisions under the Act "must

be based upon an independent consideration and evaluation of the evidence received in . . . unfair labor practice proceeding[s]." *Justak Bros. & Co.*, 253 NLRB 1054 fn. I (1981).

Furthermore, the General Counsel was not a party to the state proceeding, nor during it was Trail represented by counsel. A review of the decision and its underlying record reveals that no consideration was accorded to the unfair labor practice motivation issue which the Act requires the Board to resolve. Not all of Respondent's evidence presented during that hearing was based on firsthand knowledge, since only Doerffler testified for Respondent. In light of the foregoing considerations, I deny Respondent's motion to dismiss.

The General Counsel has made a prima facie showing of unlawful motivation for Trail's discharge. Prior to that discharge Trail had been active on behalf of the Union. Termination of a union activist can "give rise to an inference of violative discrimination." *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980). See also *Intermountain Rural Electric Assn. v. NLRB*, 732 F.2d 754, 759 (10th Cir. 1984), and cases cited therein: *NLRB v. Des Moines Foods, Inc.*, 296 F.2d 285, 289 (8th Cir. 1961).

During the hearing, and in its brief, Respondent argues that there has been no showing that Respondent had knowledge of Trail's union support and activities prior to September 20. So far as it goes, that argument is an accurate one: There is no evidence that prior to September 20 Doerffler or Nord had known about Trail's support for the Union. But, as described in section 1, on September 20 Fuglie protested to Nord about "talk about the [Union" and "this union issue." Later that same morning, Fuglie, "Basically talked to Joyce [Doerffler] about the concern of the [Union." Doerffler admitted that the determination to discharge Trail had not been made until after those conversations. Moreover, during Doerffler's conversation with Fuglie, the only driver whose

name had been mentioned had been that of Trail. Accordingly, while Respondent may not have known the extent of his union activities prior to September 20, on that date-- by the time of the determination to discharge him--it certainly possessed knowledge that Trail was involved in union activity.

Even if one might conclude that the extent of that knowledge gave rise to no more than suspicion by Respondent of union support by Trail, "the Act is violated if an employer acts against the employee[ ] in the belief that [he has] engaged in protected activities." *Henning & Cheadle, Inc. v. NLRB*, 522 F.2d 1050, 1052 (7th Cir. 1975). Accord: *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, 98 (8th Cir. 1965). In sum, in view of Fuglie's remarks to Doerffler and Nord--the two officials who made the discharge determination--the record amply supports a conclusion that, by the time of that determination, they knew, or at least suspected, that Trail was involved with the Union.

And so far as the evidence shows, he had been the only employee whom Respondent could identify by September 20 as being a union supporter. True, Doerffler testified that employee Dennis Schusted had been "known to me through the entire time [to be] a union supporter." However, she did not testify what she meant by "throughout" and did not testify with particularity when she had learned of his union support. He had been an observer for the Union at the October 14 representation election. So by the time of the hearing in the instant case obviously Doerffler knew that Schusted had supported the Union. But there is no specific evidence that she, or any other official of Respondent, had known prior to October 14 that Schusted did so. Consequently, so far as the evidence discloses, on September 20 Trail had been the only employee disposed toward the Union whose identity was known to Respondent.

Furthermore, the discharge determination was made shortly after Doerffler had acquired that knowledge. "The

inference of a cause- and-effect relationship between the two incidents is a strong one." *NLRB v. Adams Delivery Service*, 623 F.2d 96, 99 (9th Cir. 1980). Not only does such "stunningly obvious timing," *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970), "render the motive suspect," *NLRB v. J. W. Mortell Co.*, 440 F.2d 455, 457 (7th Cir. 1971), and "vulnerable," *NLRB v. Dee's of New Jersey*, 395 F.2d 112, 115 fn. 4 (3d Cir. 1968); see also *NLRB v. Council Mfg. Corp.*, 334 F.2d 161, 164 (8th Cir. 1964), but, "Such proximity can lead support to a Board inference of unfair labor practices." (Citation omitted.) *NLRB v. Tennessee Packers, Inc.*, 390 F.2d 782, 784 (6th Cir. 1968).

As described in section 1, other than saying "we've got a complaint against you," when he discharged Trail, Nord had been unwilling to either explain further the reason for that discharge or to provide a written statement to Trail concerning the reason for it. Nord's failure to do so is a circumstance which further supports an inference of unlawful motivation. See, e.g., *NLRB v. Griggs Equipment, Inc.*, 307 F.2d 275, 278 (5th Cir. 1962); *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 699 (8th Cir. 1965).

As Trail explained to Nord, so vague an explanation for discharge left Trail unable to explain his version of an incident for which he was being fired. That is a further indicator of unlawful motivation, see, e.g., *U.S. Rubber Co. v. NLRB*, 384 F.2d 660, 662663 (5th Cir. 1967); *Sterling Aluminum Co. v. NLRB*, 391 F.2d 713, 723 (8th Cir. 1968); *NLRB v. Coast Delivery Service*, 437 F.2d 264, 268-269 (9th Cir. 1971), since it evidences a lack of belief that Trail had actually engaged in misconduct. See *Automobile Workers v. NLRB*, 455 F.2d 1357, 1367 (D.C. Cir. 1971). And by failing to question Trail concerning whether he had engaged in misconduct, as well as by failing to enable him to defend himself by explaining what had occurred, Respondent failed to conduct a meaningful investigation of the purposed

misconduct for which it was firing him. That lends added support to an inference of unlawful motivation. For, it shows that Respondent was not truly interested in whether misconduct had actually occurred. See, e.g., *W. W. Grainger v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978); *NLRB v. Gogin*, 575 F.2d 596, 601-602 (7th Cir. 1978); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 48 (9th Cir. 1970).

Respondent argues that there is no evidence that it harbored animus toward the Union and its employee supporters. Yet, " [e]ven without direct evidence, the Board may infer animus from all the circumstances." (Citation omitted.) *Electronic Data Systems Corp.*, 305 NLRB 219, 219 (1991). Such an inference can be drawn, in fact, from collective evaluation of the factors reviewed in the preceding paragraphs. Indeed, "[t]iming alone may support antiunion animus as a motivating factor in an employer's action." (Citation omitted.) *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

Nevertheless, contends Respondent, "any inference of animus--and of unlawful motivation, as well--is dissipated by two added factors: First, that, knowing of his union support, Respondent skill conferred a safety award--a certificate and $700--on Schusted and, in addition, gave pay increases to three other employees who had sat with him while he served as union observer during the representation election and, second, that two other employees had been discharged in the past for infractions similar to those for which Trail was fired. However, neither factor is as persuasive as Respondent contends.

An employer's failure to discriminate against every union supporter does not disprove a conclusion that it discriminated against one of them. See *NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 374 F.2d 147, 152 (6th Cir. 1967); *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); *NLRB v. W. C. Nabors Co.*, 196 F.2d 272, 276 (5th Cir. 1952), cert.

denied 344 U.S. 865 (1952). For, as put colorfully in another context, "a piece of fruit may well be bruised without being rotten to the core." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984).

Discharge of "a single dissident may have--and may be intended to have--an in terrorem effect on others," *Rust Engineering Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971), "by making 'an example' of [one] of them." *NLRB v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 175 (7th Cir. 1954). As pointed out in section 1, the Union failed to secure a majority of votes in the October 14 representation election. Schusted's award and the pay increases granted to the other employees were not conferred until after that date. Thus, by the time of those events, Respondent had no further need to deter union support by demonstrating its economic power to disadvantage employees. To the contrary, conferring those benefits afforded Respondent with an inherent opportunity to dissuade those employees from renewing any effort to secure representation.

As to the two other dischargees, their infractions were of greater severity than the asserted misconduct attributed to Trail. One, Clarence Brown, was terminated for taking money from passengers. The other, Bonnie Lenarz, was fired for soliciting passengers to write letters to Respondent on behalf of her husband, whom Respondent had earlier discharged. Not only did Lenarz' conduct inherently undermine Respondent's disciplinary authority, but both of those terminated employees affirmatively involved passengers in the actions for which the discharges were made--that is, the passengers were not simply passive witnesses to those two drivers' misconduct.

Significantly, Respondent made no effort to rely on the discharge of Lenarz's husband as an added example of a termination comparable to that of Trail. That does not appear to have been an oversight. For, like Trail, Lenarz had been a driver and, according to Respondent, he had been discharged

for conduct which involved frightening passengers. But in Lenarz' case, that conduct had been driving his bus in a manner which so frightened passengers that, according to Doerffler, "people were frightened to ride with him." Yet, unlike Respondent's defense to the discharge of Trail, Lenarz was not discharged for the first such incident brought to the attention of Respondent. Doerffler testified that there had been similar complaints before the one that led to Lenarz' discharge, "and according to our company policy he received a verbal warning, the written warning," and, following a "final driving complaint," he was fired. Respondent advanced no explanation as to why, assuming it had truly believed that Trail had frightened passengers, that "company policy" had not been applied to him.

In sum, the two foregoing arguments, and the evidence to which they pertain, do not suffice to dissipate the evidence supporting the inference, based on a preponderance of all the evidence, that Trail's discharge had been motivated by animus toward his union involvement or, at least, suspected involvement. Moreover, in the final analysis, Doerffler and Nord each conceded that Trail's discharge determination had been based on the portions of company policy addendum no. 2 italicized in section I. As concluded above, those are overly broad rules which deprive employees of their right to engage in statutorily protected activity, thereby violating Section 8(a)(1) of the Act. Because they are unlawful, any discharge based on them is also unlawful.

In other respects, to satisfy its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (Ist Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), Respondent presented testimony by three witnesses which was unconvincing and appeared to be lacking in candor. Those conclusions are reinforced by a review of the record of that testimony, as illustrated by the examples reviewed in section I.

As a result, there is no credible evidence that Trail engaged in any actual misconduct which frightened passengers, much less was intended to frighten passengers, nor that he engaged in any other misconduct which shows that there had been a nondiscriminatory basis for discharging him. More importantly, there is no credible evidence that Doerffler and Nord had been actually motivated by a legitimate reason which, absent Trail's union sympathies and activities, would have motivated Respondent to discharge Trail, in any event, on September 20.

In these circumstances, a preponderance of the credible evidence--Trail's support for and activity on behalf of the Union, the extent of Respondent's knowledge on September 20 concerning the identity of Trail as a driver who was involved or likely involved in an organizing campaign, the timing of Trail's discharge in relation to acquisition of that knowledge by Doerffler, Respondent's unwillingness to explain fully to Trail why he was being discharged and to offer him an opportunity to explain his side of the purported infraction for which he was being discharged, Respondent's admitted reliance for that discharge on an overly broad work rule which violates Section 8(a)(1) of the Act, the existence of animus which can be inferred on the basis of the record, and Respondent's reliance for a defense on testimony that is not credible and which fails to satisfy its burden of showing a legitimate reason for discharge that would have been acted on even had Respondent not learned of Trail's union involvement--establishes that Respondent's motivation for discharging Trail had been because of his union sympathies and activities. Therefore, by discharging Trail on September 20, Respondent violated Section 8(a)(3) and (1) of the Act.

## CONCLUSIONS OF LAW

Handicabs, Inc. has committed unfair labor practices affecting commerce by discharging Ronald F. Trail because of his union support and activities, in violation of Section 8(a)(3) and (1) of the Act, and by maintaining and publicizing work rules which forbid employees from discussing wages among themselves, and which provide that discussing with clients problems and complaints about the company is prohibited and will be grounds for immediate dismissal in violation of Section 8(a)(1) of the Act.

## REMEDY

Having concluded that Handicabs, Inc., has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act.[5] With respect to the latter, it shall be ordered to modify its handbooks distributed to employees so that the unlawful portions of work rules in company policy addendums no. I and no. 2 are eliminated. It also shall be ordered to offer immediate and full reinstatement to Ronald F. Trail, dismissing, if necessary, anyone who may have been hired or assigned to the position from which he had been unlawfully discharged on September 20, 1994, or if that position no longer exists, to a substantially equivalent position, without prejudice cf his

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[5] As discussed in sec. 1, supra, Respondent now concedes that the quoted portion of company policy addendum no.1 violates the Act. Given other violations of the Act which, in section 11, I conclude violated the Act, however, Respondent's publication of a notice to employees and modification of its handbook, rescinding that rule, are not a sufficient repudiation, of themselves, to obviate the need for a remedial order encompassing the violation of Section 8(a)(1) of the Act arising from maintenance of that rule in addendum no. 1 prior to March 21, 1995.

seniority or other rights and privileges. In addition, it shall be ordered to expunge from its files any references to that unlawful discharge of Trail, notifying him in writing that it has done so, and, further, it shall be ordered to make Trail whole for any loss of pay or benefits suffered because of his unlawful discharge, with back pay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended[6]

## ORDER

The Respondent, Handicabs, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing work rules which prohibit employees from discussing wages among themselves and, further, from discussing work-related complaints and problems with passengers and clients, and which state that such discussions will be grounds for immediate discharge.

(b) Discharging or otherwise discriminating against Ronald F. Trail, or any other employee, because of activity

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and support for Miscellaneous Drivers, Helpers & Warehousemen's Union, Local No. 638, I.B.T., or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind work rules which prohibit employees from discussing wages among themselves and which prohibit employees from discussing with passengers and clients job-related problems and complaints, and, furthermore, modify and republish company policy addendums no. I and no. 2 of employee handbooks to reflect those rescissions.

(b) Offer Ronald F. Trail immediate and full reinstatement to the position from which he was discharged on September 20, 1994, dismissing, if necessary, anyone who may have been hired or assigned to that position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make Trail whole for any loss of pay and benefits suffered as a result of his unlawful discharge, with interest on amounts owing, as provided in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful discharge of Ronald F. Trail and notify him in writing that this has been done and that his discharge of September 20, 1994. will not be held against him in any way.

(d) Preserve and make available to the Board and its agents, for examination and copying, all payroll and other records necessary to compute back pay and reinstatement rights as set forth in the remedy section of this decision.

(e) Post at its Minneapolis, Minnesota office and place of business copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: May 5, 1995

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[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain nor enforce any work rule which prohibits you from discussing wages among yourselves, nor from discussing work-related complaints and problems with passengers and clients, and we will not maintain nor enforce any work rule which states that such discussions will be grounds for immediate discharge.

WE WILL NOT discharge or otherwise discriminate against Ronald F. Trail, or any other employee, because of activity and support for Miscellaneous Drivers, Helpers & Warehousemen's Union, Local No. 638, I.B.T., or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed by the National Labor Relations

WE WILL rescind work rules which prohibit you from discussing wages among yourselves and which prohibit you m discussing with passengers and clients job-related problems and complaints, and WE WILL modify and republish company policy addendums no. 1 and no. 2 of our employee handbooks to reflect those rescissions.

WE WILL offer Ronald R. Trail immediate and full reinstatement to the position from which he was discharged on September 20, 1994, dismissing, if necessary, anyone who may have been hired or assigned to that position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make Trail whole for any loss of pay and benefits he suffered as a result of our discriminatory discharge of him, with interest on the amounts owing.

WE WILL remove from our files any reference to the unlawful discharge of Ronald F. Trail on September 20, 1994, and WE WILL notify Trial in writing that this has been done and that the discharge will not be held against him in any way.

HANDICABS, INC.